Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)	MB Docket No. 17-91
	)	

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

Kenneth J. Simon
Senior Vice President and General Counsel

Monica Gambino
Vice President, Legal

Robert Millar
Associate General Counsel

CROWN CASTLE
INTERNATIONAL CORP.
1220 August Drive, #600
Houston, Texas 77057
724-416-2000 (tel)

Tamar E. Finn, Esq.
Stephany Fan, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
202-739-3000 (tel)
202-730-3001 (fax)
tamar.finn@morganlewis.com
stephany.fan@morganelewis.com

Date: August 30, 2019

TABLE OF CONTENTS

EXECUTIVE SUMMARY

As the nation's largest independent owner and operator of shared wireless infrastructure with more than 15 years of experience deploying DAS and small cell networks, Crown Castle has a unique perspective on the issues raised in the NPRM. As both an infrastructure provider and telecom service provider, Crown Castle is at the forefront of the transition to 5G networks.

The Commission's questions about revenue sharing do not recognize or distinguish the types of parties that enter into revenue sharing agreements with MTEs. For example, MTEs may enter revenue sharing agreements with neutral host operators that are not common carriers, who bring multiple carriers to the MTE. Revenue sharing agreements are a fact of doing business, and MTEs often ask for revenue sharing as part or all of the compensation to utilize space to deploy a DAS or place communications equipment on a rooftop. Prohibiting revenue sharing arrangements likely would slow broadband deployment in MTEs, as the MTE owners might have less incentive to allow for infrastructure installation in or on their buildings. Because many MTEs do not want to deal with carriers directly or negotiate agreements on a carrier-by-carrier basis, they engage experienced neutral host operators to manage and maintain installations of facilities that permit the provision of broadband services from their rooftops or within the MTE.

Crown Castle encourages the Commission to require telecommunications carriers and covered MVPDs to disclose the existence of a revenue share agreement, but not its contents. Disclosure would provide the Commission and competitive carriers transparency about the existence of revenue sharing agreements without disclosing private contractual terms that might contain sensitive business information.

The Commission also asks questions relating to MTEs' role in broadband deployment in rooftop access and DAS. It would be a step backward, and contrary to the collocation model, to prohibit exclusivity for neutral host operators. Neutral host DAS and rooftop operators that have exclusive arrangements with an MTE offer in-building collocation arrangements that are the equivalent of the collocation model on towers. The Commission should not adopt rules to undermine or prohibit such exclusive arrangements.

Rooftop collocators, with the limited exception of fixed wireless backhaul, use the MTE rooftop as a means to increase coverage and capacity for wireless users *in the vicinity of the MTE,* not inside the MTE. Crown Castle recommends the Commission not address rooftop exclusivity arrangements in this proceeding for this reason. Should the Commission nevertheless decide to do so, it should distinguish exclusivity arrangements between (1) neutral host operators and MTEs, which promotes competition because of the incentive to add more carrier customers, and (2) CMRS carriers and MTEs, which theoretically could hinder competition due to the CMRS carrier's incentive to keep competing service providers off the rooftop.

Neutral host DAS is designed to serve multiple carrier customers and to satisfy the aesthetic requirements of the MTE. Crown Castle believes that prohibiting exclusive DAS agreements between MTEs and neutral host operators would discourage investment in DAS facilities. Neutral host DAS operators allow MTEs to focus on operating their business, and allow telecommunications industry professionals to do what they do best: provide the infrastructure so the tenants have choices in broadband connectivity.

The Commission seeks comment on whether and to what extent there is confusion among tenants and/or MTEs regarding the distinction between exclusive access agreements and exclusive marketing arrangements. Here, the Commission should distinguish between different types of

exclusive marketing arrangements. Exclusive marketing arrangements between neutral host operators and MTEs exist to provide the neutral host operator exclusivity in marketing to carriers, sophisticated companies that are knowledgeable about and operate in the telecommunications field. On the other hand, exclusive marketing arrangements between a MTE and a common carrier providing service directly to tenants often confuses MTE tenants. Tenants may believe the carrier's exclusive marketing agreement with the MTE means that a carrier has an exclusive right to provide services within the building. Further, the MTE may keep other carriers from marketing within the MTE because the MTE only has a revenue share agreement with a single carrier. Because of this widespread confusion, the FCC should prohibit telecommunication carriers that market directly to MTE tenants from entering into exclusive marketing agreements with MTEs. Alternatively, Crown Castle supports requiring common carriers and MVPDs to disclose their exclusive marketing arrangements with MTEs.

Finally, the Commission cannot and should not assume that all DAS and rooftop operators are subject to its authority over common carriage or MVPDs. Nor should the Commission make broad, general classifications of rooftop or DAS offerings in this rulemaking. A neutral host operator that manages rooftop space, addresses siting and interference concerns, and subleases space to collocators is not offering telecommunications. Alternatively, if a particular offering is common carrier, the Section 201 and 202(a) requirements apply and the Section 208 complaint process are available if a customer faces discrimination or unreasonable charges.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)	MB Docket No. 17-91
	)	

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

Crown Castle International Corp. ("Crown Castle") submits these comments in response to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM")[1] seeking comment on facilities-based broadband deployment and competition in multiple tenant environments ("MTEs").

I. Introduction and Background

A. Crown Castle Has a Unique Perspective on the Varied Issues Raised in the NPRM

Founded in 1994, Crown Castle is the nation's largest independent owner and operator of shared wireless infrastructure, with more than 40,000 towers, 25,000 small cell installations and distributed antenna systems ("DAS") constructed or under contract, and over 75,000 route miles of fiber. Crown Castle has more than 15 years of experience deploying DAS and small cell

[1] *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91 ("*MTE NPRM*").

networks. Crown Castle Fiber LLC and its affiliates currently hold utility certifications in forty-seven states, the District of Columbia and Puerto Rico. Crown Castle's status as a public utility and its vast experience in deployment of broadband networks and infrastructure, including DAS and small cell facilities, puts it in a unique position in the industry.

Crown Castle is committed to facilitating the use of wireless and wired broadband to bridge digital divides and as an engine for economic growth. As both an infrastructure provider and telecom service provider, Crown Castle is at the forefront of the transition to 5G networks and is working diligently at all levels of government to educate policy makers regarding the important role small cell and fiber deployments will play in the development of 5G networks. In addition, Ken Simon, Senior Vice President and General Counsel of Crown Castle, serves on the FCC's Broadband Deployment Advisory Committee ("BDAC") and chaired the Competitive Access to Broadband Infrastructure Working Group. Because of the breadth of its interests, Crown Castle routinely works with wireless carriers, communities, governments, public safety agencies, M2M businesses, and property owners to provide access to broadband infrastructure. And while there are other companies that also provide neutral hosting, no other neutral host operator in the United States has independently deployed more DAS, small cell and fiber networks combined than Crown Castle. The cross-cutting set of experiences that Crown Castle brings to the table make it uniquely situated to assist the Commission as it develops policies concerning the role that MTEs play in increasing access to broadband.

In MTEs, Crown Castle operates both as a neutral host DAS operator/rooftop access facilitator and as a service provider that seeks access to the MTE to offer wireline broadband service. The Notice asks questions relating to MTEs' role in broadband deployment in all three of these areas: (1) rooftop access; (2) DAS; and (3) exclusive wiring/marketing. There are important

distinctions among these three areas that the Commission must consider as it contemplates whether and what rules to adopt in this proceeding. First, rooftop access uses the MTE rooftop as a means to increase coverage and capacity for wireless users *in the vicinity of the MTE*. Rooftop access thus has less to do with the MTE tenants and more to do with wireless deployment generally, making it more like towers and small cells than inside wiring. Secondly, although DAS increases coverage and capacity for wireless broadband users within the MTE, DAS uses shared equipment to receive the signals and convey them through the building. The DAS model thus also more closely resembles the shared infrastructure model of towers and small cells than the inside wire the Commission regulates under its authority over common carriers and multichannel video programming distributors ("MVPDs").

B. Neutral Host DAS and Rooftop Operators Promote Broadband Access and Competition

Neutral host DAS is designed to serve multiple carrier customers and to satisfy the aesthetic requirements of the MTE. DAS networks can be customized to meet each carrier's respective needs, with different equipment and frequency bands. At the hub, each carrier has its radio or signal source connected to the DAS headend (which is the carrier interface to the DAS), typically by coaxial cable. The carrier signals are combined over *shared* fiber out to a *shared* remote amplifier and antenna, which broadcasts the signal. The shared nature of the fiber and remote nodes distinguish DAS from inside wiring.

Neutral host DAS operators like Crown Castle generally incur all costs to design and construct a DAS. As the builder and owner of the DAS, the neutral host operator typically receives monthly fees and a one-time fee from each carrier installing and operating on the DAS. The one-time fee is significantly less than the cost to design and construct the DAS. Neutral host DAS operators upgrade equipment as market conditions demand.

Crown Castle also facilitates rooftop access for multiple providers. Crown Castle negotiates agreements with MTEs to balance development of the rooftop for the use of multiple providers with the MTE interests. The rooftop access document typically defines the rights that Crown Castle is obtaining, the amount of revenue sharing with the MTE (if any), and the rights to sublease the rooftop to communications providers. The document also typically addresses utilities, insurance, indemnification, access, hazardous materials, zoning, regulatory issues, taxes and building security, among other matters.

A neutral host model such as Crown Castle's will bring multiple communication providers to the rooftop. Crown Castle's decades of experience as a leader in the shared wireless infrastructure industry uniquely positions Crown Castle to assure that all rooftop sites it operates comply with safety and technical requirements. This is one of the primary reasons why many MTEs favor having an experienced neutral host operator such as Crown Castle manage installations of telecommunication facilities on their rooftops and negotiate contracts with communication providers that offer service to end users. In the majority of cases, the communications provider's use of the rooftop is to serve customers outside of the MTE.

A neutral host system such as Crown Castle's has a number of technical and safety benefits. As the neutral host manager or lessee of the rooftop, Crown Castle is in the position to evaluate the structural integrity of the rooftop to hold the proposed equipment taking into account the existing appurtenances and communications systems and organizing the space on the roof to lessen interference and maximize service quality. It would be more difficult if each new carrier had to coordinate and share information with existing carriers and the MTE. Crown Castle also provides routine inspections of the rooftops and identifies maintenance or safety issues to be addressed by the appropriate parties.

The MTE is not in the rooftop siting business. The leasing and management of rooftop space is not the core business of MTEs, and MTE owners lack the knowledge and background to succeed in that line of business. For example, in Crown Castle's experience, MTEs may attempt to use a standard office or residential lease to lease rooftop space, which does not address the important technical, safety, and rooftop management issues discussed above. With respect to DAS, a neutral host operator who enters into a DAS agreement with an MTE opens to all carriers the ability to serve the MTE's tenants and visitors. It is more efficient for the MTE to contract with and rely on a neutral host operator such as Crown Castle to install and manage facilities that permit multiple providers to offer wireless services within and around the MTE.

With rare exception, Crown Castle does not install telecommunication systems on rooftops for its own use. If Crown Castle has exclusive access to the rooftop or DAS, its business objective is to market and lease the rooftop/DAS to multiple communication providers. Crown Castle proactively markets its rooftops sites/DAS and makes them available to communication providers in the same manner as its tower sites, small cell nodes and its fiber assets. Exclusive agreements between neutral host providers and MTEs therefore enhance, rather than restrict, carrier access to MTEs and tenant access to multiple carriers.

II. The FCC Should Not Expand the Definition of MTE to Include Venues with Transient Guests

Any action taken by the Commission in this proceeding should apply only to MTEs as currently defined by the Commission: commercial or residential premises such as apartment, office and condominium buildings, shopping malls, or cooperatives occupied by multiple entities.[2] The

[2] *MTE NPRM*, fn, 2 ("By MTEs, we specifically mean 'commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, or cooperatives that are occupied by multiple entities.'" Citing to *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383, 5383-5384, para. 2 (2017)).

Commission should be careful not to imply that the definition of MTE includes venues such as stadiums, arenas, hospitals, transit systems, and other environments that traditionally lack multiple tenants. Although the FCC prohibited exclusive access contracts in commercial and residential MTEs, it did not prohibit exclusive access contracts for hotels.[3] The FCC found that hotel guests are transient, and prohibiting exclusive access agreements in venues with transient guests would not achieve the same competitive benefits as in MTEs with tenants.[4] Because venues such as hospitals, stadiums, and arenas also have primarily transient guests, the same rationale applies.

III. Revenue Sharing

A. The Commission Should Distinguish Revenue Sharing Arrangements Based on the Parties Involved

In 2001 and 2008, the Commission prohibited common carriers from entering into or enforcing contracts that granted the common carrier exclusive access for the provision of telecommunications services to tenants in commercial and residential MTEs.[5] The FCC found such contracts were an unjust and unreasonable practice that perpetuated barriers to facilities-based competition.[6] Because limiting competitive access to tenants limits consumer choice and adversely affects rates, quality, innovation and redundancy, the Commission prohibited such exclusive access agreements.[7]

The Commission now seeks comment on whether revenue sharing agreements have similar negative impacts on competition and deployment in MTEs. The Commission asks whether it should require the disclosure, or restrict the use, of revenue sharing agreements for broadband

---

3 In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, 23 FCC Rcd 5385 (6), para. 7 (2008) ("*Competitive Networks Order*")

4 *Id.*

5 *Competitive Networks Order*, at para. 1.

6 *Id*. at para. 2.

7 *Id*. at paras. 8, 12.

service.[8] According to the Commission, revenue sharing agreements involve the MTE receiving either a percentage of revenue generated from service fees or a door fee per unit from the communications provider in return for giving the provider access to the building and its tenants.[9]

The Commission's questions about revenue sharing do not recognize or distinguish the types of parties that enter into revenue sharing agreements with MTEs. For example, MTEs may enter revenue sharing agreements with neutral host operators that are not common carriers. Revenue sharing agreements are a fact of doing business, and MTEs often ask for revenue sharing as part or all of the compensation to utilize space in or on top of the MTE. In this way, revenue sharing encourages MTEs to permit the placement of telecom-related equipment on rooftops or within the MTE. Revenue sharing between the neutral host operator and MTE is a typical practice for rooftop sites, but is not universal. Approximately 55% of Crown Castle's rooftops sites have revenue share provisions as all or a portion of the consideration to the MTE. Many MTEs do not want to deal with carriers directly or negotiate agreements on a carrier-by-carrier basis, and they often find comfort in engaging experienced neutral host operators to manage and maintain installations of facilities that permit the provision of broadband services from their rooftops or within the MTE.[10] In addition, it has been Crown Castle's experience that MTEs are reluctant to enter into agreements involving rooftop access/DAS where the sole consideration is a one-time amount or a monthly flat payment. Prohibiting revenue sharing arrangements likely would slow

---

8 *MTE NPRM*, at para. 15.

9 *Id.*

10 *See Comments of the National Multifamily Housing Council, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142 (July 24, 2017) ("NMHC NOI Comments") ("Property owners also rely on the certainty that they will not be tasked with the significant maintenance responsibilities that come with communications facilities, including diagnosing and fixing wiring problems.")

broadband deployment in MTEs, as the MTEs might have less incentive to allow for infrastructure installation in or on their buildings.

B. Limited Disclosure of the Existence of Revenue Sharing Agreements Would Provide Needed Transparency.

The Commission also seeks comment on whether it should require all Internet service providers or only telecommunications carriers and covered MVPDs to disclose the existence of revenue sharing agreements to the public, and if so, what contents should it require in a disclosure.

Section 211(b) of the Act enables the Commission to require common carriers to file contracts,[11] such as the revenue sharing agreements between MTEs and common carriers. Crown Castle encourages the Commission to require telecommunications carriers and covered MVPDs to disclose the existence of a revenue share agreement, but not its contents. Specifically, the Commission should consider requiring common carriers (wireline and wireless) and covered MVPDs to submit a list of contracts that include revenue sharing provisions with MTEs. Disclosure would provide the Commission and competitive carriers important visibility about the existence of revenue sharing agreements without disclosing private contractual terms that might contain sensitive business information. As discussed in Section VII, however, the Commission cannot and should not assume that all DAS and rooftop operators are common carriers.

IV. Exclusivity Arrangements Between an MTE and Neutral Host Operator Promotes MTE Building Access by Multiple Providers

The Commission seeks comment on competitive access to rooftop facilities, addressing both rooftop and DAS exclusivity agreements. As part of its inquiry, the Commission asks whether it should prohibit telecommunications carriers and covered MVPDs from entering rooftop

[11] 47 U.S. Code § 211(b).

exclusivity agreements or prohibit providers under its jurisdiction from enforcing existing DAS exclusivity agreements.

It would be a step backward, and contrary to the collocation model, to prohibit exclusivity for neutral host operators. At the advent of wireless telecommunications, carriers originally constructed their own towers for deployment. As a result, multiple towers were built together in close proximity to provide necessary coverage for each individual provider. In the late 1990's, tower companies identified a market for shared infrastructure, capitalizing on the benefits of sharing both to the carriers and to the environment. Congress has recognized that collocation is the preferred method of deployment.[12] In 2012, Congress adopted Section 6409 as a provision of Title VI of the Middle Class Tax Relief and Job Creation Act of 2012.[13] Section 6409 established that applications for collocations meeting certain eligible facility criteria must be approved by local jurisdictions.[14] The enactment of this provision signaled Congress' preference for the collocation of antennas. The Commission also recognized that "collocation on existing structures is often the most efficient and economical solution for mobile wireless providers that need to expand their existing coverage area, increase their capacity, or deploy new advanced service."[15] Neutral host DAS and rooftop providers that have exclusive arrangements with an MTE offer in-building collocation arrangements that are the equivalent of the collocation model on towers. The Commission should not adopt rules to undermine or prohibit such exclusive arrangements.

---

12 47 CFR § 1.1306, note 1 ("The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged").

13 *See Middle Class Tax Relief and Job Creation Act of 2012* § 6409(a), 47 U.S.C. § 1455.

14 *Id.*

15 *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* Report & Order, 29 FCC Rcd 12865, para. 142 (2014).

i. Rooftop Exclusivity Arrangements Do Not Affect Competition in MTEs

The Commission seeks comment on the benefits and drawbacks of rooftop exclusivity agreements, and whether it should prohibit telecommunications carriers and covered MVPDs from entering such agreements, including agreements that would have the effect of exclusivity.

Crown Castle emphasizes that rooftop exclusivity agreements have nothing to do with providing service or coverage to tenants inside the MTE. With the limited exception of fixed wireless backhaul, infrastructure deployed on rooftops increases coverage and service quality in the immediate area *surrounding* the MTE, not within the building. Crown Castle recommends the Commission not address rooftop exclusivity arrangements in this proceeding, as it does not impact competition in MTEs.

Should the Commission nevertheless decide to address rooftop exclusivity arrangements, it should distinguish exclusivity arrangements between (1) neutral host operators and MTEs and (2) CMRS carriers and MTEs. The former type encourages competition because neutral host operators such as Crown Castle are incentivized to add more carrier customers. On the other hand, rooftop exclusivity arrangements between CMRS carriers and MTEs theoretically could be anticompetitive due to the CMRS carrier's incentive to keep competing service providers that wish to provide or improve competing services off the rooftop. However, in Crown Castle's experience, this is not usually found in practice.

As explained in Section I.B., there are numerous benefits of exclusive rooftop agreements with neutral host operators such as Crown Castle. Exclusive rooftop agreements hasten and simplify carrier access to MTEs. A neutral host operator such as Crown Castle negotiates to bring multiple communication providers to the rooftop while complying with all safety and technical

requirements, such as organization of the equipment and maintenance. This allows the MTE to rely on Crown Castle's expertise. The exclusive rooftop agreement promotes competition if the exclusive agreement is between a MTE and a neutral host operator such as Crown Castle, because its business objective is to market and lease the rooftop to multiple communication providers.

ii. Neutral Host DAS Operators Promote Competition in MTEs

The Commission seeks comment on whether exclusive agreements between DAS providers and MTEs are common and whether it should prohibit providers under its jurisdiction from enforcing existing DAS exclusivity agreements.[16]

Crown Castle agrees with the Wireless Infrastructure Association ("WIA") that neutral host DAS networks lower barriers to entry for new market participants and encourage broadband deployment by providing cost savings and enhancing a carrier's speed to market. Neutral host DAS operators promote competition because their business model incentivizes them to add carrier customers to their DAS. DAS are designed to be used by more than one carrier, and can be customized to meet each carrier's respective needs, with different equipment and frequency bands. An exclusive arrangement between a MTE and a neutral host DAS operator such as Crown Castle allows the MTE to have a single DAS network installed on its property at no cost to it, which satisfies the MTE's aesthetic concerns and accommodates all wireless carriers. With this model, MTE tenants enjoy greater choice by being able to select one of multiple carriers that meet their needs.

Because neutral host DAS operators spend a great deal of effort and money to negotiate the ability to build out DAS in each MTE, allowing other carriers to deploy their own coverage solutions despite existing DAS agreements would undermine the incentive for neutral host DAS

16 *MTE NPRM*, at para. 22.

operators to deploy DAS technology. Crown Castle agrees with WIA's assertion that neutral-host operators have an interest in marketing to and ultimately hosting as many carrier customers as possible, which allows the market to promote additional broadband deployment using existing structures.

In Crown Castle's experience, MTEs are also, at times, very sensitive to aesthetic impacts, and having multiple carriers with their own standalone technologies will have a greater aesthetic impact. While two DAS may not be obtrusive, if the FCC were to prohibit carriers from entering into exclusive arrangements and four major wireless carriers and local WISPs all demanded a right to install DAS in an MTE, the equipment could be obtrusive and negatively impact the MTE and MTE tenants. In this way, prohibiting exclusive DAS agreements with neutral host operators may decrease tenant choice if the MTE, because of aesthetic or space concerns, limits entry to one or two DAS providers. Wireless carrier-operated DAS operators also may have incentives to limit access to their competitors, which would reduce consumer choice and limit competition within an MTE.

Crown Castle believes that prohibiting exclusive DAS agreements between MTEs and neutral host operators would discourage investment in DAS facilities. Neutral host DAS operators allow MTEs to focus on operating their business, and allow telecommunications industry professionals to do what they do best: provide the infrastructure so the tenants have choices in broadband connectivity. In Crown Castle's experience, MTEs are not adequately staffed and knowledgeable about the telecommunications infrastructure industry and, therefore, desire an exclusive partnership with a neutral host DAS operator to take care of it all.

The Commission also seeks comment on the effect DAS access agreements have on deployment of advanced technology, and whether it should encourage or require providers to use

DAS facilities that meet certain compatibility or future-proofing requirements.[17] Arguments that existing DAS facilities may be antiquated or incompatible with newer technology are misguided. Neutral host DAS operators upgrade equipment as market conditions demand in order to keep up with technological advances. For example, to accommodate a third carrier on a DAS in an MTE, Crown Castle recently removed existing equipment and installed new equipment with upgraded technology and a footprint that was 40% smaller, benefitting the MTE, tenants, and carriers using the DAS.

V. The Commission Should Continue to Allow the Use of Exclusive Wiring Arrangements

The Commission seeks comment on whether it should prohibit exclusive wiring arrangements, where an MTE allows additional providers into a residential MTE but prohibits them from using the existing wires.[18] The Commission seeks comment on whether to revisit its 2007 decision, which found that exclusive wiring arrangements do not absolutely deny new entrants access to buildings.[19]

The Commission has found that exclusive wiring arrangements "do not absolutely deny new entrants access to [residential MTEs] and thus do not cause the harms to consumers" caused by exclusive access agreements.[20] The Commission has not listed any policy considerations to revisit this conclusion today, and the technological landscape of in-building wiring has not changed significantly enough to warrant the Commission to change its policy. Unlike DAS in-building transport that can be shared, inside wire should not be shared by wireline providers. Crown Castle agrees with the Commission that the cable TV or wired broadband provider that

17 *MTE NPRM*, at para. 23.
18 *MTE NPRM*, at paras. 4, 26.
19 *Id.*
20 *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20237, para. 1 & n.2

deploys service to its customers should have exclusive use of the inside wire that serves each customer. Forced sharing of inside wire could discourage investment and upgrades and cause practical difficulties, both technical and control.

Furthermore, inside wiring owned by MTEs is not subject to Commission jurisdiction. MTEs are in the business of leasing space. When an MTE and a service provider enter into an exclusive wiring agreement, the provider is allowed to occupy space in the building. Limitations on the terms of such agreements would be a regulation of the MTE, not a regulation of the provider, and would be beyond the Commission's jurisdiction.

VI. Exclusive Marketing Arrangements Cause Confusion When a Carrier is Marketing to MTE Tenants, but Not When a Neutral Host Operator is Marketing to Other Carriers

The Commission seeks comment on whether and to what extent there is confusion among tenants and/or MTEs regarding the distinction between exclusive access agreements, which are not permitted by the Commission's rules, and exclusive marketing agreements, which are permitted, and how to correct such confusion.[21] The Commission also seeks comment on whether it should require disclaimers and disclosures by carriers and covered MVPDs making clear that there is no exclusive access agreement and that customers are free to obtain services from alternative providers, and what impact such a disclosure requirement would have.[22]

Again, the Commission should distinguish between different types of exclusive marketing arrangements. Exclusive marketing arrangements between neutral host operators and MTEs exist to provide the neutral host operator exclusivity in marketing to carriers, sophisticated companies that are knowledgeable about and operate in the telecommunications field.

---

21 *MTE NPRM*, at para. 27.

22 *Id.*, at para. 28.

On the other hand, exclusive marketing arrangements between a MTE and a common carrier providing service directly to tenants often confuses MTE tenants. Tenants may believe the carrier's exclusive marketing agreement with the MTE means that a carrier has an exclusive right to provide services within the building. Moreover, the MTE may keep other carriers from marketing within the MTE because the MTE only has a revenue share agreement with a single carrier. In the market for fiber-based broadband services, Crown Castle has been denied access to certain buildings based on these exclusive marketing arrangements. Because of this widespread confusion, the FCC should prohibit telecommunication carriers that market directly to MTE tenants from entering into exclusive marketing agreements with MTEs. Alternatively, Crown Castle supports requiring common carriers and MVPDs to disclose their exclusive marketing arrangements with MTEs. The sharing of this information and transparency in exclusive marketing arrangements would create a fair market for tenants and carriers and correct this confusion.

VII. The Commission Cannot Assume that DAS and Rooftop Operators Are Common Carriers

The Commission seeks comment on its statutory authority to address the exclusivity issues raised in the NPRM under sections 201(b) and 628 of the Act to facilitate broadband, telecommunications service, and video deployment and competition within MTEs.[23] If only acting as to covered MVPDs and telecommunications carriers, the FCC seeks comment on whether sections 201(b) and 628(b) provide the authority to require disclosure of revenue sharing and exclusive marketing agreements.[24]

The Commission's actions to date have been based on asserting jurisdiction over the practices of common carriers and MVPDs. The Commission cannot and should not assume that

23 *See MTE NPRM*, at paras. 32-25.
24 *MTE NPRM*, at para. 37.

all DAS and rooftop operators are subject to its authority over common carriage or MVPDs. Nor should the Commission make broad, general classifications of rooftop or DAS offerings in this rulemaking. The 1996 Act defines a "telecommunications carrier" as "any provider of telecommunications services" and defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public."[25] Typically, the Commission evaluates each service on a case-by-case basis to determine whether the service offering is a "telecommunications service" or "non-telecommunications service." A neutral host operator that manages rooftop space, addresses siting and interference concerns, and subleases space is not offering telecommunications.

Nor is it clear that neutral host DAS operators are common carriers. Depending on the design of the DAS, it may or may not offer point-to-point transport of information. Even offerings that are point-to-point transport can be provided on a private carrier basis. Determining whether a particular offering is a private carrier offering "requires an understanding and analysis of the facts regarding particular service offerings".[26] And as the Commission has recognized, a company can be a common carrier with regard to some activities but not others.[27]

---

[25] 47 U.S.C. § 153(53) (The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." The Act also contains a separate category of services known as "information services", which is defined in relevant part as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.")

[26] *Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5, RM-10593, Report and Order, 32 FCC Rcd 3459, para. 270 (2017) ("*BDS Order"*).

[27] *National Ass'n. of Regulatory Util. Comm'rs. v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*") ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one may be a common carrier with regard to some activities but not others."

Under the framework for distinguishing between common carriers and private carriers, the analysis turns on the manner in which a company holds itself out to the public. Common carriers undertake to provide service "indifferently" to all potential customers, whereas private carriers "make individualized decisions, in particular cases, whether and on what terms to deal" with customers.[28] For example, the Commission found that cable companies were offering certain broadband services on a private carriage basis in the 2017 Business Data Services Report & Order ("BDS Order").[29] The Commission cited to the individualized decisions on whether to offer service to each given customer, and the highly-individualized rates and terms offered to meet the particular needs of a given customer.[30] The Commission also recognized that the customers for these services are generally large wireless carriers, other large service providers, or enterprises.[31] While the court in *T-Mobile v. Crow* did go through the common versus private carrier analysis, it did not analyze whether the DAS service in question fell under the definition of "telecommunications" in the first instance.[32] Neutral host DAS and rooftop operators have not yet been classified as providing telecommunications services, and should not be broadly categorized as such in a rulemaking proceeding.

Alternatively, if a particular offering is common carrier, the Section 201 and 202(a) requirements apply and the Section 208 complaint process are available if a customer faces

---

28 *NARUC II*, at 608; *National Ass'n. of Regulatory Util. Comm'rs. v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*"); *see also PLDT v. Int'l Telecom*, File No. E-95-29, FCC 97-233, ¶13 (rel. July 18, 1997); *Independent Data Communications*, 10 FCC Rcd 13717, 13723-24 (1995); *Beehive Tel., Inc. v. Bell Operating Cos.*, 10 FCC Rcd 10562, 10564-65 (1995), *remanded*, No. 95-1479 (D.C. Cir. Dec. 27, 1996).

29 *See* BDS Order, para. 267-285.

30 *BDS Order*, para. 271-272.

31 *BDS Order*, para. 272.

32 *See T-Mobile v. Crow*, 2009 WL 5128562 (D. Ariz. Dec. 17, 2009).

discrimination or unreasonable charges.[33] Section 201(a) places a duty on common carriers to furnish communications services subject to Title II "upon reasonable request" and "establish physical connections with other carriers" where the Commission finds it to be in the public interest.[34] Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[35] Section 202(a) of the Act prohibits "any unjust or unreasonable discrimination in charges . . . for or in connection with like communication service . . . ."[36] As such, there is little need for the Commission to take additional action on service offerings that qualify as common carriage because of the protections available under Sections 201, 202 and 208. For example, in the BDS Order, the Commission declined to intervene to regulate wholesale business data services, citing section 201(b)'s prohibition against unjust or unreasonable practices and section 202(a)'s prohibition against unjust or unreasonable discrimination as better protections than the Commission's attempts to regulate pricing.[37] The Commission found that its section 208 complaint procedures remain available to remedy any claimed anticompetitive or discriminatory behavior.[38] The Commission should take the same approach here. To the extent a common carrier controls a DAS and is discriminating or acting in an anticompetitive manner, carriers seeking access to the DAS can use the Commission's complaint process as a remedy.

33 47 U.S.C. §§ 201; 202; 208.
34 47 U.S.C. § 201(a).
35 47 U.S.C. § 201(b).
36 47 U.S.C. § 202(a).
37 *BDS Order*, at para. 260-265.
38 *BDS Order*, at para. 264.

CONCLUSION

For the foregoing reasons, the Commission should not prohibit revenue sharing, exclusive rooftop and DAS agreements, or exclusive marketing arrangements for neutral host operators such as Crown Castle. The Commission should, however, require the disclosure of the existence of revenue sharing arrangements, and prohibit (or alternatively require disclosure of) exclusive marketing arrangements for common carriers and MVPDs providing service to MTE tenants.

Respectfully submitted,

/s/ Stephany Fan
Tamar E. Finn, Esq.
Stephany Fan, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
202-739-3000 (tel)
202-730-3001 (fax)
tamar.finn@morganlewis.com
stephany.fan@morganelewis.com

/s/ Monica Gambino
Monica Gambino
Vice President, Legal
CROWN CASTLE
INTERNATIONAL CORP.
1220 August Drive, #600
Houston, Texas 77057
724-416-2000 (tel)

Date: August 30, 2019